Office-Supreme Court, U.S.
FILED
AUG 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1957

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM C. SCRIMGEOUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's admission that his previous grand jury testimony was false barred his prosecution for false statements under the recantation provision of 18 U.S.C. 1623(d).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Association of Bituminous Contractors v. *Andrus*, 581 F. 2d 853 7

Barrett v. *United States*, 423 U.S. 212 7

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 5

De Sylva v. *Ballentine*, 351 U.S. 570 7

Great Atlantic & Pacific Tea Co. v. *FTC*, 106 F. 2d 667, cert. denied, 308 U.S. 625 7-8

People v. *Ezaugi*, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 ..... 6, 9

Union Insurance Co. v. *United States*, 73 U.S. (6 Wall.) 759 7

United States v. *An Article of Drug . . . "Bentex Ulcerine,"* 469 F. 2d 875, cert. denied, 412 U.S. 938 8

United States v. *Crandall*, 363 F. Supp. 648, aff'd without opinion, 493 F. 2d 1401, 495 F. 2d 1369, cert. denied, 419 U.S. 852 9

Page

Cases—(Continued):

United States v. *Culbert*, 435 U.S. 371 7

United States v. *Earth Sciences, Inc.*, 599 F. 2d 368 7

United States v. *Fisk*, 70 U.S. (3 Wall.) 445 7

United States v. *Moore*, 613 F. 2d 1029, cert. denied, 446 U.S. 954 ..... 4, 5, 6-7, 10

United States v. *Scharton*, 285 U.S. 518 7

United States v. *Standard Oil Co.*, 384 U.S. 224 7

Constitution, statutes and rule:

United States Constitution, Fifth Amendment 3

18 U.S.C. 1623 ..... 1, 4, 5

18 U.S.C. 1623(a) 7

18 U.S.C. 1623(d) 2, 4, 5, 7, 8

18 U.S.C. 1623(e) 6

N.Y. Penal Law § 210.25 (McKinney 1965) 6

Fed. R. Crim. P. 6(e) 2-3, 9

Miscellaneous:

H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970) 6

S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 636 F. 2d 1019.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1981 (Pet. App. 1), and a petition for rehearing was denied on March 16, 1981 (Pet. App. 24-25). The petition for a writ of certiorari was filed on May 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 11, 1979, petitioner was indicted in the United States District Court for the Southern District of Florida on five counts of knowingly making false material declarations before a grand jury, in violation of 18 U.S.C. 1623. On petitioner's motion, the district court dismissed the

indictment, holding that prosecution was barred by the recantation provision of the statute, 18 U.S.C. 1623(d), which provides that a person who admits that he has made false declarations will not be prosecuted for those declarations "if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." The court of appeals reversed and remanded for trial (Pet. App. 4-5, 21).

1. The factual context of petitioner's indictment is described in the opinion of the court of appeals (Pet. App. 4-7). Briefly, a grand jury in the Southern District of Florida was convened in 1976 to investigate price fixing in the southern Florida bond paper market (*id.* at 5). Petitioner, the general manager of Southern Paper Company, first testified before the grand jury on June 16, 1977 (*ibid.*). Prior to petitioner's initial grand jury appearance, David Boynton, the division manager of Virginia Paper Company, had revealed to government attorneys that petitioner had attended price fixing meetings (*ibid.*). However, petitioner testified before the grand jury that no one had discussed prices at the meetings described, and he refused to change his testimony even after he had twice been warned of the penalty for perjury (*ibid.*).[1]

On July 27, 1977, Michael Nachwalter, who was then the attorney for petitioner and Southern Paper Company, contacted a government attorney concerning petitioner's possible perjury and requested a copy of his grand jury testimony (Pet. App. 5). This request was refused on the ground that grand jury proceedings are secret under Fed. R.

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[1] Prior to his testimony, petitioner was advised of his rights (R. 26-28). He stated that he was represented by counsel for Southern Paper Company, but further stated that he had not informed counsel that he had been subpoened (R. 27).

Crim. P. 6(e) (Pet. App. 5). A written request for a copy of the transcript was later denied by government counsel on August 17, 1977, on the ground that disclosure was prohibited absent a court order (*id.* at 5-6).

In the meantime, the grand jury investigation made no progress until September 15, 1977, when Joe Lincks, the branch manager of MAC Papers, Inc., appeared before the grand jury. Lincks testified, in contradiction to earlier testimony that he had given in March 1977, that petitioner had attended price fixing meetings (Pet. App. 6). A few hours after Lincks had testified, petitioner's counsel called a government attorney and stated that he knew that Lincks had been a "songbird" (*ibid.*).

In October 1977, petitioner's new attorney, James Hogan, stated to government counsel "that Scrimgeour had lied" and that he "wanted him to go back to the grand jury and straighten it out" (Pet. App. 6). After the government again refused petitioner's request for a copy of the grand jury transcript without a court order, Hogan moved to compel disclosure of the transcript (*ibid.*). After a hearing on the motion, disclosure was granted on November 7, 1977. Hogan conceded at the hearing that "even if we appear and recant under 1623 the Government can still indict [Scrimgeour] for perjury under 1621 and 1623 if they so wish * * *" (*ibid.*). On the same day, petitioner appeared again before the grand jury and read a prepared statement, in which he admitted that his prior statements were false and corrected his former testimony (*ibid.*).[2]

In December 1977, the month following petitioner's recantation, the grand jury expired without returning an indictment for price fixing (Pet. App. 6). In September

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[2]When petitioner was questioned at the conclusion of his prepared statement, he invoked his Fifth Amendment privilege against self-incrimination (R. 109-110).

1978, a second grand jury returned price fixing indictments, to which petitioner and other defendants pleaded *nolo contendere* (*ibid.*). On January 11, 1979, the second grand jury also returned the present indictment charging petitioner with knowingly making false material declarations in violation of 18 U.S.C. 1623.

2. The district court dismissed the indictment. The court first concluded (Pet. App. 7) that a witness successfully recants prior false testimony if he satisfies either of the two conditions specified in 18 U.S.C. 1623(d). Turning to the particular facts of this case, the district court then concluded that petitioner had satisfied both conditions (Pet. App. 7).[3]

The court of appeals reversed. Relying on the District of Columbia Circuit's analysis of the legislative history of 18 U.S.C. 1623(d) in *United States* v. *Moore*, 613 F. 2d 1029, 1039-1045 (1979), cert. denied, 446 U.S. 954 (1980), the court of appeals concluded (Pet. App. 14) that a witness may not successfully recant prior false testimony unless he satisfies both statutory conditions. The court of appeals held (*id.* at 15-16) that petitioner had not successfully recanted his testimony within the meaning of the statute because he had failed to satisfy the requirement that recantation occur before it becomes manifest that the prior false testimony "has been or will be exposed." Thus, petitioner's prosecution for making false statements was not barred by the recantation provision of 18 U.S.C. 1623(d).

ARGUMENT

Petitioner contends (Pet. 4-7) that the court of appeals erred in holding that both statutory preconditions, that the

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[3]The district court also suggested that dismissal of the indictment was warranted on due process grounds because the government allowed petitioner to recant his testimony without warning him that a perjury indictment would be sought. The court of appeals rejected this finding (Pet. App. 20-21), and petitioner has not raised this issue in his petition.

false testimony has not substantially affected the proceeding and that it has not become manifest that the falsity of the statement has been or would be exposed, must be satisfied before a witness can invoke the recantation provision as a bar to prosecution under 18 U.S.C. 1623. This claim was properly rejected by the court below. Moreover, this Court has only recently declined to review this question in *United States* v. *Moore*, 613 F. 2d 1029 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980). There is no conflict among the circuits, and further review is therefore unwarranted.

1. We note at the outset that the decision of the court of appeals places petitioner in the same position that he would have been in if the district court had denied his motion to dismiss, in which case petitioner would have had no right to an interlocutory appeal. Review by this Court is unnecessary at the present juncture because petitioner has not yet been tried. In the event that he is acquitted, the issue that he seeks to raise here will be moot. On the other hand, if he is convicted and his conviction is affirmed, he will again be able to seek review in this Court with respect to this and any other issue that he might have. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

2. At all events, the court below correctly held that a witness must meet both conditions set forth in Section 1623(d) if he is to benefit from the bar to prosecution established in this section. Although the statute uses the word "or" to connect the two preconditions, the court of appeals properly determined that the clear legislative intent of the section requires that the two preconditions be read in the conjunctive.

Section 1623 was enacted to encourage witnesses to testify truthfully before courts and grand juries. To accomplish this purpose, Congress facilitated perjury prosecutions by eliminating rigid common-law requirements such as the two-witness and direct-evidence rules, thereby lowering the

government's burden of proof. See 18 U.S.C. 1623(e); S. Rep. No. 91-617, 91st Cong., 1st Sess. 57-59 (1969).[4] At the same time, Congress saw fit to include as part of the statutory scheme a limited right to retract prior false testimony. H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 47-48 (1970). This provision, permitting recantation, was based on New York law (N.Y. Penal Law § 210.25 (McKinney 1965)), which allows recantation only if it occurs before the falsehood substantially affects the proceeding *and* before it becomes manifest that the falsity will be exposed. See *People* v. *Ezaugi*, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957). Despite Congress' avowed intention to follow the New York statute (see S. Rep. No. 91-617, *supra*, at 150; H.R. Rep. No. 91-1549, *supra*, at 47-48), it nevertheless placed the word "or" between the two preconditional clauses, rather than the word "and" used in the New York law. However, as the District of Columbia Circuit recognized in *United States* v. *Moore*, *supra*, 613 F. 2d at 1042-1043, this unexplained change was clearly not intended to work the dramatic departure from New York law that petitioner suggests (see Pet. 4-7). In *Moore*, the court noted (613 F. 2d at 1042-1043; footnotes omitted):

> Had so drastic a departure from the New York statute as a switch from combinational to alternative satisfaction of its carefully developed preconditions been really intended, we believe Congress would have said so. Had Congress actually intended a nearly complete overruling, in the practical sense, of the Supreme Court's longstanding pronouncement on the serious drawbacks of recantation in the quest for truth, we

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[4]The Senate Report states (S. Rep. No. 91-617, *supra*, at 58, quoting a 1967 report of the President's Crime Commission) that " '[l]essening of rigid proof requirements in perjury prosecutions would strengthen the deterrent value of perjury laws and present a greater incentive for truthful testimony.' "

> would expect a much fuller explanation. Had Congress, after making crystal clear its purpose to promote truthtelling to the hilt, intended the almost wide-open door to prevarication that disinjunctive construction of the statutory preconditions would furnish, it hardly would have failed to elucidate its logic.

Congress certainly did not intend to foster a situation in which a perjurer could effectively bar his prosecution once his false testimony had been discovered merely by admitting to the falsity of that which the government already knew to be false. Yet this would be the result of a disjunctive reading of the statute. In these circumstances, the court below was correct in reading the statute in light of its legislative history and commonsense meaning. See *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *Barrett* v. *United States*, 423 U.S. 212, 218 (1976); *United States* v. *Standard Oil Co.*, 384 U.S. 224, 225 (1966); see also *De Sylva* v. *Ballentine*, 351 U.S. 570, 573 (1956) ("or" read as "and"); *United States* v. *Earth Sciences, Inc.*, 599 F. 2d 368, 375-376 (10th Cir. 1979) (same); *Association of Bituminous Contractors* v. *Andrus*, 581 F. 2d 853, 862 (D.C. Cir. 1978) (same); *Union Insurance Co.* v. *United States*, 73 U.S. (6 Wall.) 759, 764 (1867) (same); *United States* v. *Fisk*, 70 U.S. (3 Wall.) 445, 447 (1865) (same). The conjunctive reading of "or" is both grammatically permissible and reasonable in Section 1623(d)'s context of defining an exception to the offense.[5] The court's reading of the statute also comports with the maxim that exceptions to statutes should be construed narrowly. *United States* v. *Scharton*, 285 U.S. 518, 521-522

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[5]The question presented concerns the construction of a section carving out an exception to a substantive offense, not the section stating the substantive offense. Thus, there can be no argument here that 18 U.S.C. 1623(d) must be given the interpretation petitioner urges, despite the compelling indications of congressional intent to the contrary, in order to avoid the possibility of punishing someone who did know what the law proscribed. Here, petitioner's testimony clearly violated 18 U.S.C. 1623(a).

(1932); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667, 674 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940); see also *United States* v. *An Article of Drug . . . "Bentex Ulcerine,"* 469 F. 2d 875, 878 (5th Cir. 1972), cert. denied, 412 U.S. 938 (1973).

3. It is also clear, as a matter of fact, that petitioner did not satisfy either precondition to invoking the protection afforded by 18 U.S.C. 1623(d). As the court of appeals found, it had become manifest to the petitioner prior to his attempted recantation that his testimony before the grand jury was known to be false and would be exposed (Pet. App. 16-18).[6] During the June 16, 1977, grand jury proceeding in which petitioner testified falsely, he was twice warned about the severe penalties for perjury, and he was given an opportunity to change his testimony (*id.* at 5). Petitioner's attorney mentioned his possible perjury in a conversation with government counsel in July 1977 (*ibid.*), and petitioner's attorney told government counsel in September 1977 that petitioner knew that Lincks had been a "songbird" (*id.* at 15). At the hearing on the motion to disclose the grand jury transcript, petitioner's new attorney noted the possibility of a perjury indictment when he remarked that even if petitioner reappeared and recanted before the grand jury, "the Government can still indict him for perjury under 1621 and 1623 if they so wish * * *" (*id.* at 6). At the same hearing, government counsel stated that petitioner was a target of the grand jury's investigation (*id.* at 16). Petitioner was therefore aware that the government had evidence that directly contradicted his false testimony, and the statements made by petitioner's attorney, concerning a possible perjury indictment, confirmed that it had become manifest that petitioner's falsity had been exposed (*ibid.*).

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[6]Petitioner does not seek review of the finding of the court of appeals that it had become manifest that the falsity of his testimony had been exposed.

Petitioner's false testimony also substantially affected the grand jury investigation. Five months elapsed between petitioner's false testimony and his admission that this testimony was false (Pet. App. 5-6). When petitioner reappeared before the grand jury, only one month remained in the term of the grand jury. The lapse of time is a critical element in estimating the "substantial affect" of a false declaration. *United States* v. *Crandall*, 363 F. Supp. 648, 654-655 (W.D. Pa. 1973), aff'd without opinion, 493 F. 2d 1401, 495 F. 2d 1369 (3d Cir.), cert. denied, 419 U.S. 852 (1974) (attempted recantation untimely because of two-month delay); see also *People* v. *Ezaugi*, *supra*, 2 N.Y.2d at 443, 141 N.E.2d at 583, 161 N.Y.S. 2d at 78 (court emphasized the importance of a prompt recantation). The lengthy delay in this case was clearly sufficient to affect the proceedings substantially. See *United States* v. *Crandall*, *supra*, 363 F. Supp. at 654-655.[7] Moreover, petitioner's original testimony, if it had been truthful, would have helped to narrow the focus of the investigation, even if it had not resulted in an immediate indictment. Instead, his false testimony contradicted Boynton's testimony, the only testimony then available concerning price fixing. As a result, the government was required to prolong the investigation in an attempt to resolve the conflict in testimony. Thus, petitioner's false testimony contributed directly to the need for a second grand jury. To hold a that deliberate misleading of a grand jury that is not corrected until five months later does not produce a substantial affect would frustrate the purpose

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[7]Furthermore, petitioner did not request a court order to obtain access to the transcript until five months after his false testimony, although the government correctly refused to disclose the transcript without such an order, and petitioner's counsel understood that he could move the district court to order the government to disclose the transcript (GX 1 at 2). See Fed. R. Crim. P. 6(e).

of the statute to encourage truthful testimony at all times by every witness. *United States* v. *Moore, supra*, 613 F. 2d at 1043.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

DOJ-1981-08